THE SCOPE OF THE SHERMAN ACT; THE INTENTION OF ITS FRAMERS.[1]

By C. O. Gardner,
Harrison Fellow, University of Pennsylvania.

I. *The Passage of the Law*

On December 4, 1899, Senator Sherman of Ohio, introduced a bill in the Senate declaring "unlawful trusts and combinations in restraint of trade and production." The bill was referred to the Finance Committee which reported it, on December 14, 1890, in slightly amended form. The bill proved to be unsatisfactory and was referred back to the same committee on March 21. On March 27, the whole matter was referred to the Judiciary Committee, which reported, on April 2, a bill in the form in which it was finally enacted into law. This bill passed the Senate, April 8. It was then sent to the House where several amendments were attached; later a conference committee of the two houses struck out the amendments proposed by the House and recommended the passage of the bill in the form in which it had come from the Judiciary Committee. Both the Senate and the House accepted the recommendations of the committee and the bill became law July 2, 1890.

II. *The Authorship of the Act*

According to the best evidence at hand, the Sherman Act was the joint production of the members of the Judiciary Committee. Senator Edmunds wrote sections 2, 3, 5 and 6, and all of section 1, except the words "in the form of trusts or otherwise," which were probably inserted at the suggestion of Senator Evarts; Senator George wrote section 4; Senator Hoar wrote section 7; and Senator Ingals, section 8.

III. *The Framers' Views as to the Scope of the Act*

1. Was the Sherman Act intended to apply to all combinations? In support of the statement that it was not intended to apply to all combinations, we have the following evidence:

Senator Sherman, while explaining the bill which he had introduced, said: "It aims only at unlawful combinations; it is the unlawful combinations, tested by rules of the common law and human experience, that are aimed at in this bill, not the useful or lawful combinations." . . . After stating that, in his judgment, all trusts would have the inevitable effect of preventing competition and restraining trade he continued: "Still this can not be assumed against any combination unless upon a fair hearing it should appear to a court that the agreement is necessarily injurious to the public and destructive of fair trade."

[1] The main sources of information consulted in preparing this note were the debates in the Senate and the committee reports on the proposed law.

Congressman Culbertson, one of the House members of the conference committee, said: "Just what contracts, etc., will be in restraint of trade will not be known until the courts have construed and interpreted this prohibition."

Senator Hoar, in his autobiography, declares that he considers the law will never be held to prohibit lawful and harmless combinations. He says:

"We thought it best to use this general phrase (speaking of the wording in section one), which, as we thought, had an accepted meaning in the English law; and then after it had been construed by the courts, Congress would be able to make such other amendments as might be found by experience necessary."

Senator Edmunds, the chairman of the Judiciary Committee, in an article in the *North American Review* for December, 1911, expresses much the same sentiments in regard to the meaning of the law.

2. Was the law intended to apply to railroads? The original Sherman bill and the various amendments that were introduced early in the session, included combinations to prevent competition in transportation as among the things to be prohibited. The Bland amendment, introduced in the House, specifically declared that transportation corporations should come within the act. This amendment was adopted without debate in the House and later was agreed to by the Senate. Senator Hoar, in speaking of the amendment, explained that the Judiciary Committee had agreed to its insertion into the act, although they considered it already covered. "There is no harm," he says, "in concurring in an amendment which expressly describes it, and an objection to the amendment might be construed as if the Senate did not mean to include it." Later, the Bland amendment was stricken out by the conference committee as unnecessary.

3. Was the statute meant to apply to labor organizations? Objection was made to the original Sherman bill because it was so worded that it might possibly apply to such organizations. To meet this objection, Senator Sherman himself offered a proviso which declared that the statutes should not be construed to apply to labor organizations. In doing so he declared that he considered it unnecessary as the bill was never intended to reach them, but that he would submit it to avoid confusion. The proviso was adopted by the House, but later was stricken out by the conference committee.

4. Was the law intended to include the regulation of production? The title of the original Sherman bill was "A bill to declare unlawful trusts and combinations in restraint of trade and production." It is clear that the early bills were designed to reach production as well as commerce, but the great objection raised to the original bill and its substitute was that they would be held unconstitutional and the elimination in the final draft of all reference to production was probably due to an attempt to so word the bill as to avoid all possibility of it being attacked by the courts on the ground of unconstitutionality.